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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

Brief in Opposition to Motion to Dismiss
or Affirm of Connolly and Bellotti.

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CORRECTION OF QUESTIONS PRESENTED

The QUESTIONS PRESENTED stated by the defendants/appellants Connolly and Bellotti in their Motion to Dismiss or Affirm (or, in the Alternative, Brief in Opposition to Cert) are misleading and, as it is a deliberate obfuscation that has been the principal tactic of the respondents throughout this litigation, the obfuscation must be clarified. As stated by the defendants/appellants, the the questions might more properly be called: BEGGING THE QUESTIONS PRESENTED.

Assuming the Question at Issue

Nothing is more obvious than that this litigation centers around the constitutionality of the notion that a

party, as a private group, can make a rule and then, under the right of "Freedom of Association," add that private rule to the statutes of a state as written and duly enacted by a legislature. Nonetheless, the defendants/appellees persist in assuming the resolution of this radical departure in American constitutional jurisprudence in the framing of their case, as if the vaunted "clout" of the Massachusetts democratic political machine could somehow prevent this obvious attempt to assume the most controversial of their contentions from being examined.

Thus we see Connolly and Bellotti, in their Question Presented number 1 in this Motion, asking rhetorically whether, in

light of this Court's rejection of an appeal/or denial of cert in an earlier case which they staged, Bellotti v Connolly, 460 US 1057 (1983), a substantial federal question now exists concerning the validity of the Massachusetts statutory scheme for obtaining access to the primary ballot under the First and Fourteenth Amendments to the United States Constitution.

Leaving aside for the moment the unsupportable, artificial, separation-out of the questions presented by Art I,Sec.4, Cl.1 which, as we have pointed out, must be considered together with the First and Fourteenth Amendments in the case of a U.S. senate race in order for the

questions raised by those amendments to be properly considered, this framing of the question assumes the very radical notion which the defendants/appellees must prove in order for the lower court to be upheld: that the party inner group has a First Amendment right to go around adding its private rules to the state statutes as enacted by the duly elected legislature.

Of course no substantial federal question exists now, nor ever has, concerning the validity of the Massachusetts statutory scheme for primary ballot access, as written and enacted by the people's elected representatives of the legislature of Massachusetts. Plaintiffs/appellants have never made any claim that

the state statutory scheme for ballot access is invalid and in fact plaintiffs/appellants have clearly argued that this Court and any other federal court are required not only to recognize the state statutory scheme as presumptively valid, but to regard it, under 28 U.S.C. 1652, as a rule of decision.

What plaintiffs/appellants attack is the notion that the defendants/appellees can go around having an inner group of party members incorporating private rules into this state statutory scheme.

The antipathy of the Founding Fathers of this country toward political parties is well known. They were bound and determined not to give political parties

the power over voters and candidates that parties enjoyed in 18th Century England. This power in parties, in the eyes of the Founding Fathers, was the sure road to a ruinous rule of "faction," as they termed it. What we have here is a transparent attempt to insert political parties into the Constitution in defiance of the clear intent of that document and its authors. As such the attempt should be firmly rejected. Let not history record that this Court went along with the fond hopes of the defendants/appellees that such transparent begging of the real questions in this case could succeed.

Likewise the second question asks whether the state statutory scheme

violates Art I,Sec.4,Cl.1. Of course it doesn't. We never said it did. What we attack is the notion that a private party can add its rules to that state statutory scheme by virtue of the First Amendment.

CLARIFICATION OF CONNOLLY AND BELLOTTI'S STATEMENT OF THE CASE

A related obfuscation is attempted in Connolly and Bellotti's opening sentence of their STATEMENT OF THE CASE, which reads:

> This action challenges both a party rule and the Massachusetts statutory scheme which incoporates it and which limits access of candidates for statewide office to the Democratic primary ballot.

This is incorrect. We do not challenge the party rule. Party rules are fine as far as we're concerned, so long as you

don't claim you can engraft them upon the laws in defiance of the legislature. Likewise, it's the alleged "incorporation" of the private rule into the state statutory scheme that we attack, not the state statutory scheme. It is quite startling that Connolly and Bellotti think that this kind of "business as usual" which works in Boston will work in this Court. We respectfully submit that it is an insult to the intelligence and integrity of the Court. It should be firmly repudiated.

The Langone Obfuscation

Another obfuscation favored by Connolly and Bellotti is illustrated in

the last sentence of their Statement of the Case:

> The appellees now seek plenary review of the very issues which were before this court just two years ago.

This Court, of course, will be the judge of the accuracy of this assertion regardless of the insinuations of Connolly and Bellotti. However, it should be noted that there is simply no way that this assertion could be correct. This Court's dismissal of Bellotti's and Langone's appeal for want of jurisdiction, and its denial of cert cannot be dispositive here for the very simple reason that the prescription of state legislatures regulating senatorial races is an exercise

of delegated federal authority under Art I, Sec.4,Cl.1, unlike the same law as it regulates state lt.-gubernatorial races.

Despite the attempts of Connolly and Bellotti to artifically separate them out, this affects the First and Fourteenth Amendment issues. The Art I,Sec.4,Cl.1 issue cannot be isolated in a vacuum from the First and Fourteenth Amendment issues. Whether there are violations of these amendments must be viewed in light of the requirements of Art I,Sec.4,Cl.1 and the cases under it.

If the state legislature has not prescribed the 15 percent rule in the manner that it must under this clause, then any inequality introduced by the

rule, which, in instances like the present one, virtually disenfranchises 94+ percent of the party's rank-and-file, is per se violative of the Fourteenth Amendment. Similarly, it would violate the freedom to associate of all the party members, not just an inner group, since the inner group was not given the claimed special function in accord with the specific Art I provision.

THE ATTEMPT TO HIDE THE CLAIMED FEDERAL RIGHT BEHIND A STATE COURT "INTERPRETATION"

The other principal obfuscation relied upon by the other side in this litigation has again shown up in the Connolly motion. This is the notion that once a state court can be pursuaded (It

seems to have been rather easy in this instance.) to rather drastically alter the plain meaning of the exclusive provisions of the state statutory scheme as written in order to accomodate a claimed federal constitutional right, then somehow this dramatic "accomodation" becomes an interpretation, by the state's highest court, of a state statute on independent grounds which can then no longer, by virtue of some magical transmogrification, be examined by federal courts.

The simple fact is, as stated by Mr. Justice Stevens of this Court, joined by Mr. Justice Rehnquist and Madame Justice O'Connor, Bellotti v Connolly, 460 US 1057, that:

> The Massachusetts Supreme Judicial Court construed Chapter 53 to recognize the Democratic party's 15% rule because it believed that such a construction was required by the United States Constitution..."

If the construction is not required by the United States Constitution, then the unambiguous language of the state statutory scheme as written is binding upon this Court and every other federal court. Whether the federal constitution requires such a construction or not is hardly a question that is solely one of state law.

The Connolly motion deliberately distorts this sequence of events. (p. 8) Rather than telling us correctly that the state court bent the state law to

accomodate the alleged federal right, Connolly and Bellotti pull the old switcheroo. We are told that the state court "did not stop with an exposition of state law." No, "it went on to consider the constitutionality of the 15% Rule in a context identical to that presented by this appeal." With this little bit of sophistry this Court is expected to accept the magical transmogrification and believe that a case in which a state statute is bent to "accomodate" a claimed First Amendment right is equivalent to case in which a state statute is interpreted by its highest court free of any claims of conflicting federal rights and then it is determined whether the state statute as so

interpreted by the state's highest court is then in violation of a federal right. The two things are not the same.

DELEGATION AGAINST THE WISHES OF THE DELEGATOR: A NEW PRINCIPLE OF AGENCY

On page 15, after telling us there is no federal question involved, Connolly and Bellotti then cite a number of federal cases involving federal questions for the proposition that they are right that there is no federal question. After this little feat of prestidigitation, they then point out that several cases in the lower federal courts prove, because, they say, there is no conflict between them, that the "involvement of political parties in augmenting the statutory requirements for

ballot access or in playing a direct role in the selection of party nominees." is okay.

They don't, however, bother to inform the Court that there is not one of these cases in which a political party asserts a right under the First Amendment to delegate authority to itself to "augment" the statutory requirements for ballot access in defiance of a legislature's clearly expressed intent that such a delegation not be made, such as is now claimed by the defendants/appellees.

One need only ask the question, "Where is this delegation to be found?" to see how unsupportable the notion is. The legislature can scarce have made it

clearer that there was no such delegation. It revoked the authority for pre-primary conventions altogether, refused to enact 7 bills to revive and expand that authority and then passed a bill specifically repudiating the authority when it was claimed as a matter of federal inherent right. This delegation, then, is unique in the annals of jurisprudence. It is compelled by the delegee party as a matter of inherent federal right under the First Amendment, compelled from the legislature which holds the authority, against its wishes. The legislature can't control the delegation of this authority which is its own. Surely our basic law on agency ought to be rewritten to accomodate this

wondrous new right, along with our prior inadequate concepts of the First Amendment, which was thought heretofore to be a protective shield, not a hook to reach out and rip power away with.

Regardless of what Connolly and Bellotti may think plaintiffs/appellants argued (We think there's misunderstanding on this score.) there is no delegation of power here. Though the lower court has based its opinion on the supposition of the existence of such a delegation, it's not able to point to any delegation. This is with good reason; no delegation exists, whether we argued it or not.

SMILEY V HOLM

We are happy to see that parties on

the other side have taken cognizance of the existence of the unanimous opinion of this Court in Smiley v Holm, 285 US 355, (1932). However, since the opinion of Mr. Chief Justice Hughes in that case was that what was meant by the Times, Places and Manner Clause was what was recognized by the Founding Fathers at the time of the drafting of the Constitution as the normal process of legislative lawmaking, with all its accoutrements, we are somewhat puzzled by the conclusion then drawn, namely, that it is part of the method prescribed by Massachusetts for legislative enactments that the state laws as written and passed by the legislature shall then be bent to

"accomodate" First Amendment claims of Freedom of Association. We submit that it cannot have been part of what the Founding Fathers intended that the bending of state laws to accomodate claimed federal rights was part of the prescription of the legislatures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States Mail, first class, postage prepaid, this 22d day of April, 1985, true and accurate copies of the foregoing Brief in Opposition to Motion to Dismiss or Affirm of Connolly and Bellotti, upon Thomas R. Kiley, Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record for defendants/appellees Connolly and Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass. 02110, counsel of record for defendants/appellees Atkins and the Democratic State Committee, 3 copies for each defendant.

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